

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

**SUPPLEMENTAL BRIEF OF THE UNITED STATES AS INTERVENOR
DEFENDING THE CONSTITUTIONALITY OF 35 U.S.C. § 292**

During the hearing on January 30, 2008, the Court asked the parties to address briefly the question of whether there are other enforcement mechanisms within the Federal Government with regard to the patent mismarking provisions in 35 U.S.C. § 292; in particular, the Court asked whether the Federal Trade Commission has an enforcement role in this area.

We have consulted with the General Counsel’s office at the FTC on these questions. We have been informed that the FTC has no authority to enforce Section 292. We nevertheless note that some conduct that violates Section 292 might independently constitute violations of Section 5 of the FTC Act (15 U.S.C. § 45), which the FTC does enforce. However, such an enforcement action by the FTC would depend on a determination that the elements of Section 5 have been met. For example, Section 5 prohibits certain deceptive acts, and an enforcement action under this provision would require a showing of, among other things, materiality (*i.e.*, that the false statement about a product’s patent status would matter to an ordinary consumer). See *In re Cliffdale Associates*, 103 F.T.C. 110, 182-83 (1984); *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

In sum, the FTC does not have a role in enforcement of Section 292, but it is possible that some conduct that violates Section 292 would also violate the FTC Act, and such violations could

be the subject of enforcement actions by that agency. To the extent that the Court was posing a broader inquiry, we are not aware that any federal agency other than the Department of Justice would have any role in enforcement of Section 292 through actions in court.

We hope that this statement responds to the Court's questions.

Respectfully submitted,

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